NO. 15871

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
Appellants,

—vs.—

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

Appearances:

FOR APPELLANTS:

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Attorneys-at-Law,
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Shelby, Montana.

FOR APPELLEE:

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Mr. Dale F. Galles, Assistant United States Attorney, Box 1478, Billings, Montana.

Perry W. Morton, Assistant Attorney General;

Roger P. Marquis, Chief, Appellate Section;

Elizabeth Dudley, Attorney, Dept. of Justice, Lands Division, Washington, D. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

TABLE OF CITATIONS

IN A CONDEMNATION PROCEEDING WHERE SEVERAL PARCELS ARE OWNED BY A PARTNERSHIP, JUST COMPENSATION SHOULD BE BASED ON A BEFORE AND AFTER EVALUATION OF THE WHOLE TRACT.

Appellee's argument, p. 7, states this proposition: "The District Court correctly ruled that where severally owned tracts of land are condemned in one proceeding, the value of each tract should be separately assessed."

Here again, as throughout the trial, the hearing on the Motion under Rule 60 (b), and again in its brief, Appellee has **assumed** that the three parcels are separately owned. Appellants have at all times attempted to point out to the Court that the lands were owned by the partnership. This misconception has been the major misunderstanding by Appellee throughout all of these proceedings. The uncontradicted evidence contained in the affidavit attached to Appellants' Motion under Rule 60 (b) shows that the land was owned by the partnership, regardless of in whose name the record title stood.

This is not merely a case where parcels separately owned were farmed as a unit, which is the situation in all of the cases cited by Appellee at pp. 8 and 9 of its brief. The three requirement for one award set forth in City of Stockton v. Ellingwood, 275 P. 228, at p. 243, a California case, which has been voluminously quoted in Appellants opening brief, all exist in this case. These requirements are:

(1) Unity of ownership,
(2) Land which is physically contiguous.
(3) And unity in use.

As pointed out in Appellants' brief, the physical contiguity and unity of use are conceded. Appellee, in its brief, proceeds blithely to ignore the evidence on unity of ownership. The Stockton case, supra, is on all fours with the situation here, but Appellee has not even seen fit to discuss the case in its brief.

Appellee makes much of the fact that Appellants were given an opportunity by the trial court to submit a brief on their contention, but the transcript clearly shows that Appellants were making two contentions:

1. That there was one ownership of the entire tract;
2. That even though there were separate ownerships, they could be tried together and one award made.

It was upon this second contention that the Court suggested that Appellants could submit a brief. At pp. 56 and 57 of the manuscript, in ruling on Appellants' Motion under Rule 60 (b). Judge Murray said:

> " . . . The Court granted the continuance and also gave counsel for the Defendants a week within which to present the Court some authority to the effect that **even though three**

> **ownerships were involved, they could be valued as one because they had been operated as a unit.** * * * Neither the counsel who tried the case for the Defendants, nor their present counsel have presented the Court any authority holding **that land held in different ownerships, but operated as a unit may be considered as a whole** for the purpose of determining fair market value in a condemnation case, and the Court has been unable to find any such authority."

This demonstrates that the Court at all times assumed several ownerships, and did not suggest that Appellants submit a brief on the unity of ownership. The question as to whether the lands were owned in partnership was one of fact, and the trial court did not, and would not ordinarly ask, to have a brief written on a question of fact. The Appellants were entitled to have the jury pass upon this important question of fact, if there was any contest or dispute concerning it.

Appellee argues in its brief, p. 10, that counsel did not, in the language of Rule 46, F. R. C. P., "make known to the Court the action which he desires the Court to take on his objection to the action of the Court, and

his grounds therefore." In connection with this, it should be pointed out that no objection was ever made to the evidence of Appellants, and no ruling made on the inadmissability of the evidence, except by implication, and consequently, since Appellants had no opportunity to object to a ruling, the absence of an objection does not prejudice them. See the last sentence of Rule 46, F. R. C. P., and the transcript, pp. 122, 123 and 127.

Appellee, in its brief, p. 11, quoting Ivins v. Hardy, 120 Mont. 35, 179 P. 2d. 745, apparently contends for the first time that there was no partnership at all. Even Judge Murray and counsel for Appellee did not deny the existence of the partnership, merely the partnership ownership of the land. The Hardy case, supra, dealt only with the question of whether the filing of partnership income tax returns was sufficient to prove the existence of a partnership. Appellants' case is much stronger than that, as Mr. Kolstad's affidavit shows more than eight other indicia of partnership ownership, which were ignored by Appellee in its brief, p. 11. The evidence contained in Appellants' affidavit in support of the Motion under Rule 60 (b), is conclusive and uncontradicted that it was their intention to own the property as tenants in partnership.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION TO SET ASIDE THE JUDGMENT UNDER RULING 60 (b), F. R. C. P.

It was conceded at the trial (tr. p. 125), and by Judge Murray in his Order on the Rule 60 (b) hearing (tr. p. 57), that the larger and more economical of operation a farm is, the greater the severance damage, and the higher the value of the land taken. Where Appellants, on the hearing on their Motion under Rule 60 (b), introduced uncontradicted evidence of the unity of the ownership of these three tracts, the Court abused its discretion in refusing to vacate the judgment.

As was said in U. S. v. 12. 381 acres of land, more or less, situated in Curry County, New Mexico, 109 Fed. Sup., 279:

> "* * * In an action between the government and one of its citizens, most liberal construction of statutes and rules should be given, in order to prevent unfair and unjust treatment; * * * "

This case also was a hearing on a Motion under Rule 60 (b), F. R. C. P.

In Re Cremitas' Estate, 14 F. R. D. 15, the Court said:

> "Rule 60 (b) further provides for setting aside a judgment for any one of five specified reasons or for '(6) * * * any other reason justifying relief from the operation of the judgment.' In order to take advantage of the reason specifying mistake, inadvertance, surprise or excusable ne-

Cray, 5 Wall. 795, 807, 18 L. ed. 653, 657; Smith v. Shoemaker, 17 Wall. 630, 21 L. ed. 717."

On pp. 13, 14, and 15 of its brief, Appellee argues that Appellant Clarence Kolstad made inconsistent statements concerning the ownership of the land. These statements are readily reconciled, and are entirely consistent with the theory of partnership ownership. It is submitted that Mr. Kolstad was merely citing the layman's idea of a partnership, that is, that each owned half of the property, and further testimony would have explained this, and that each, as a partner, had equal rights and equal ownership in the partnership funds and assets. Likewise, Mr. Kolstad's statements were made for the purpose of negativing any idea of a gift by him to his wife. It may further be said that Mr. Kolstad was merely stating how the bare legal title stood when the property was acquired. This question has been amply covered by Appellants in their opening brief, pp. 8, 9 and 10. The affidavit and exhibits filed in the hearing on the Motion under Rule 60 (b) show that the partnership was not an afterthought, as Appellee states, but had existed in fact for many years. The Court was advised that the land was owned by the partnership, but denied Appellants the right to so testify and explain the previous testimony.

THE TRIAL COURT ERRED IN REFUSING TO SET ASIDE THE JUDGMENT ON THE GROUND OF NEWLY DISCOVERED EVIDENCE CONCERNING THE TESTIMONY OF JOE MEISSNER.

It is obvious that the Government, in its brief, pp. 16 and 17, has misconceived the testimony of Mr. Meissner and Mr. Kolstad concerning the average production per acre. The production figures testified to by Mr. Meissner total 104 bushels for the 6 years, giving an average of 17 1-3 bushels per **producing** acre, compared to the testimony of Mr. Kolstad of 22 bushels per **producing** acre. To compare the 11 bushels per cultivated acre testimony of Mr. Kolstad with that of Mr. Meissner, it would be necessary to divide the Meissner average of 17 1-3 acres by two, giving approximately 8 plus bushels per acre compared to Mr. Kolstad's 11 bushels. So it is seen that the testimony substantiates the assertion by Mr. Kolstad that the error in the Meissner testimony reduced the income of the land by over $21,000.00. The affidavit of Clarence Kolstad as to the wheat production, and the Meissner testimony, is correct, as all of the Kolstad acreage was controlled through the ASC office at Chester, in Liberty County, regardless of the fact that a small portion of the land was located in the neighboring county of Toole. The Kolstad wheat marketing card was issued by the Liberty County office, and all of his allowable wheat acreage planting was controlled by the Liberty County office.

CONCLUSION

In view of the Montana cases of Rockefeller v. Dellinger, 56 Pac. 822, 22 Mont. 418, Rinio v. Kester, 41 P. (2d) 405, 99 Mont. 1, and the evidence contained in Appellants' affidavit in support of their motion under Rule 60B FRCP and the lack of contradictory evidence or authority from the Appellee, it seems clear that the Court cannot do otherwise than to find that a partnership ownership existed since it has been conceded that the larger the tract the larger the damages. Defendant has been greatly prejudiced and it was error for the trial Court to deny appellants' motion under Rule 60B. This action by the trial Court also constituted an abuse of descretion.

It is again re-iterated that the trial Court at all times misconceived the true question.

Respectfully Submitted,

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